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JUL 18 1997

**FEDERAL COMMUNICATIONS COMMISSION
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Federal-State Joint Board on
Universal Service**

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CC Docket No. 96-45

**COMMENTS IN OPPOSITION TO
A STAY OF THE UNIVERSAL SERVICE ORDER PENDING JUDICIAL REVIEW**

**The American Library Association
1301 Pennsylvania Ave. NW
Suite 403
Washington, DC
20009**

July 18, 1997

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Comments of the American Library Association in Opposition to the Request for Stay Pending Judicial Review in CC 96-45

I. Introduction

On July 3, 1997, Southwestern Bell Telephone Company and Pacific Bell/Nevada Bell (henceforth "petitioners") filed a joint petition¹ ("petition") for pending judicial review in the Federal Communications Commission's ("Commission") universal service proceeding.² This petition comes in response to the Report and Order on Universal Service³ ("the Order"), which was released on May 7, 1997 and published in the Federal Register on June 16, 1997.

The Order was the result of a year-long process at the Commission which included 5 rounds of formal comment and numerous ex parte filings. More than 54,000 pages of comments were filed with the Commission. In arriving at its final decision, the Commission balanced the concerns of several hundred parties, including telecommunications carriers of all sizes, various service providers (including cable, wireless, and Internet providers), and various library, education, and rural health care groups, as well as federal agencies and state public utilities commissions. The resulting Order established, among other programs, discounts of up to \$2.25 billion annually to help alleviate the costs of telecommunications services for libraries and schools. A 1996 survey by the National Commission of Libraries and Information Science, cited

¹Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell. Joint Petition for a Stay Pending Judicial Review. CC Docket No. 96-45. Filed July 3, 1997.

²CC Docket 96-45.

³Federal-State Joint Board on Universal Service. CC Docket No. 96-45. Report and Order 97-157 (released May 8, 1997).

in ALA's previous filings demonstrated that the cost of communications was the number one factor affecting library involvement with the Internet.⁴

In order for the Commission to grant Petitioners a stay, the Commission must consider the test established in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) as modified by Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Under that test, petitioners must demonstrate that (1) they are likely to succeed on the merits of the case; (2) they will suffer irreparable harm absent a stay; (3) a stay will not harm other interested parties; (4) a stay would be in the public interest. ALA contends that Petitioners have failed to meet all of the elements of this test and their petition should be denied.

The American Library Association, founded in 1876, is the oldest and largest library association in the world. With a membership of more than 57,000 librarians, library trustees, library educators, friends of libraries, and other interested persons from every state, ALA is the chief advocate of the people of the United States in their search for the highest quality of library and information services. ALA's concerns span all types of libraries -- including state, public, school, academic, and special libraries -- many of which will be recipients of the universal service support outlined in the Order. ALA has been an active participant throughout this proceeding, commenting in all five rounds of formal comment before both the Federal-State Joint Board on Universal Service and the Commission. ALA has also made numerous ex parte filings

⁴See ALA Comments, April 10, 1996 at 7.

and presentations to the Commission.

II. Petitioners are unlikely to succeed on the merits: discounts on services for libraries, schools, and rural health care providers are consistent with the Telecommunications Act of 1996.

Petitioners claim that universal service support for internal connections and Internet services violate Sections 254(c)(3), (h)(1)(b), and (h)(2)(a) of the Telecommunications Act of 1996 (“the Act”). ALA believes that the Commission has provided sufficient support for their interpretation in its explanations which are incorporated in the Order, and will not repeat those arguments at this time. We believe that the Commission’s interpretation of the services eligible for support⁵ follows the legislative history and intent in the Act, while following the word of the law as well. ALA believes that the Commission is well within its authority under the Act to specify the range of services, level of discounts, and methods of cost recovery for the universal service program and that, as a result, Petitioners are unlikely to succeed on the merits.

⁵ See, e.g., 49 U.S.C. § 1402(a)(1)(A).

III. Failure to stay the program would not cause irreparable harm to the petitioners

Petitioners claim a number of irreparable harms would result from the implementation of the Order. Specifically, petitioners claim that continued reliance on implicit funding mechanisms will hinder their competitiveness; that they will be obliged to fill orders from libraries and schools seeking service; and that the implementation of the Order would harm customer goodwill. However, the base of Petitioners' arguments is the claim that an immediate, irreparable harm would be incurred by implementation because of the need to collect funds.

Petitioners claim that the implicit mechanism used to collect funds would hinder their competitiveness. By placing these implicit charges within the access charges that local exchange carriers charge to other telecommunications carriers, Petitioners claim that the Order violates the intent of the Act to eliminate implicit subsidies and move to a more explicit system. Petitioners claim that irreparable harm will be the result of the implementation of the program, since an additional \$2.65 billion in support will be provided to schools, libraries, and rural health care providers. However, in order for this harm to be realized, funds must actually be collected. Given that these program will not go into place until January 1, 1998 -- almost six months after the date of Petitioners' filing -- a stay is not warranted at this time. Petitioners will not be required to contribute to the fund until the program is actually put into place.⁶

⁶Funds for the libraries and schools portion of the Universal Service Fund will be collected on an as-needed basis from carriers. If funds are collected on an as-needed basis, it is unlikely that Petitioners could face any charges until January 1, 1998.

Similarly, the claim that the implementation of the Order (and the funding of discounts) would force them to fill contracts with libraries, schools, and health care providers also assumes that the discount program has gone into effect before any harms can be incurred. Petitioners claim that the implementation of the program will cause schools, libraries, and rural health care providers to approach Petitioners for services. If Petitioners are successful in their challenge to the program, they claim that they will not be able to make whole their losses. For example, an entity entitled to receive discounted services under the libraries and schools discounts program might sign a contract with Petitioners that assumes discounts will be received, but the carrier would be unable to receive compensation for the "discounted" portion of the rate if Petitioners challenge is successful. This argument assumes both that Petitioners will be successful (which we find unlikely) and that the program will be implemented before Petitioners challenge can be resolved (and hence libraries and schools will begin to receive the discounts to which they are entitled). The latter assumption also presupposed that the program will be implemented and the discounts will begin to be disbursed. Given that the program is not scheduled to go into effect until January 1, 1998, Petitioners do not face any irreparable harm in the immediate future. A stay would therefore be inappropriate at this time.

Petitioners claim that they will suffer an irreparable harm to customer goodwill based upon the rate increases that they will be forced to pass along to their customers in order to support the universal service program. Much like the above arguments, this argument assumes that funds must be collected in order for any harm to result. Given the time frame set by the

Commission in the Order, Petitioners do not face any harm for some time, and a stay would therefore be inappropriate. Furthermore, Petitioners' customer goodwill is likely to decrease as a result of their actions to delay implementation of universal service discounts for libraries and schools as is evidenced by letters already sent by Petitioners' customers. (See Attachment 1)

Finally, Petitioners also claim that they will suffer "unrecoverable economic losses" as a result of implementation of the rule. In 1996 SBC and its current subsidiaries had combined revenues of over \$23.5 billion, with SBC posting a 31% return to shareholders, and Pacific Telesis, a 41.8% return, -- twice the national average of 16% for companies in the United States as reported by Business Week on November 18, 1996.

IV. Introducing a Stay Would Cause Irreparable Harm to Libraries, Schools and their Communities.

Contrary to the assertion of SBC and PacBell that libraries and schools would actually be well served by a stay, libraries and schools would be irreparably harmed by the imposition of a stay in the universal service proceeding. SBC and PacBell assert that the imposition of a stay would prevent libraries and schools from going through the preparations necessary for the application process, including the preparation of technology plans, collection of data relevant to the determination of the discounts level, and the assembling of an inventory detailing the elements outlined by the FCC.⁷

This assertion makes the erroneous assumption that libraries and schools are not already

⁷Petition at 29.

in the process of assembling this information. Since libraries and schools across the country have been following the process closely, they have been the necessary materials since the Order was published. There has also been widespread publicity about the universal service program alerting libraries and schools to the potential benefits of the program. In addition to the general press, articles on the universal service discounts have appeared in professional publications such as American Libraries and Computers in Libraries as early as March 1996, in addition to regular bulletins, presentations, and meetings given to inform librarians and their communities about universal service developments. Perhaps the most dramatic illustration of the level of interest in this program is the PBS-sponsored videoconference "Maximizing your E-Rate," which aired on June 3, 1997. Final registration for this event exceeded 1,100 different sites, reaching an estimated 15,000 to 20,000 viewers. A majority of these sites were libraries or schools seeking additional information about the discount program. In addition, the Commission, the US Department of Education, state education and library agencies, and numerous other entities have been inundated since the Order was released by requests for information and applications dealing with the universal service program.

The widespread public interest in the federal universal service proceeding has also been mirrored in the proceedings taking place at the state level. As of the date of this filing, we understand that more than two dozen state public utilities commissions have approved the federal discount program or have opened dockets to deal with the issue. In many of these state dockets, libraries and schools have filed comments with the state commissions.

The interest in the federal universal service proceeding has also manifested itself in the states in the form of widespread preparation for the discount program. The Order outlines a number of requirements as part of the application process for libraries and schools, including the need for an approved technology plan and a technology inventory. Despite the fact that application forms are not yet available for the program, libraries at all levels -- including individual libraries, library systems, library consortia, and state libraries -- have begun to assemble this information in preparation for when the applications are made available. Many of these libraries and schools have also altered their technology plans and service plans to reflect the shift in resources that this program will entail. For example:⁸

- Based on the savings that they project they will receive from the universal service fund, the Miami-Dade Public Library System in Florida is exploring possibilities for upgrading the types of access offered to the public, improving facilities, and increasing their service staff in order to better serve the public.⁹
- The Unified School District of DePere, in DePere, WI, has placed its implementation of its technology strategy on hold until January 1, 1998, when it expects to be able to take advantage of the discounts to which it is entitled. This has already caused them to lose an entire year of educational opportunities while

⁸For additional examples, see, Comments in Opposition to the Petition for Stay filed by the Education and Library Networks Coalition (EdLiNC), CC Docket No. 96-45, filed July 18, 1997.

⁹Manny Lomba, Assistant Director, Miami-Dade Public Library System, Miami, Florida, *Impact of the Loss of Telecom Discounts on the MDPLS*, asstdir1@shadow.net, (July 17, 1997).

waiting for the discount program to be implemented.¹⁰

- In Nebraska, the state library commission reports that many libraries in the state are collecting the necessary information to take advantage of the discounts and are altering their service plans. Many libraries that previously have been unable to offer access to the public because of the high cost are now revising their service plans to allow access to the public starting in early 1998, based upon the commencement of the discounts program.¹¹

Delaying the implementation of the discount program for libraries and schools would cause a significant and irreparable harm to the recipients of these discounts and their communities. A June 16 Wall Street Journal story reported that only about 14.4% of households have Internet access from their PCS.¹² Public libraries in contrast are visited by about 82% of households with children under 18.¹³ Libraries provide a natural place for the public to gain access to the emerging digital information infrastructure. The Department of Commerce reported that 60% of the new jobs in the next century will require information networking and

¹⁰Karl Klein, Technology Director, Unified School District of DePere, DePere, WI, *USF Support*, kwklein@netnet.net, (7/16/97).

¹¹Rod Wagner, Director, Nebraska Library Commission, Lincoln, NE, *SBC Lawsuit*, rwagner@neon.nlc.state.ne.us, (7/11/97).

¹²"No Place Like Home," The Wall Street Journal. Monday, June 16, 1997, R4.

¹³National Center for Education Statistics. Use of Public Library Services by Households in the United States: 1996. Statistics in Brief, March 1997.

communications skills possessed by only 22% of workers today.¹⁴ A stay would only further disenfranchise a large segment of Americans from access to the information tools of today.

The January 1, 1998 date set by the Commission for the beginning of the program assumed that a number of very tight deadlines would be met -- the reconsideration process would need to be finished, applications and application procedures would need to be set in place, the fund administrator would be authorized to begin work (including the design of mechanisms to process applications and post the necessary information to the website designed by the Fund Administrator). Delaying this process with a stay could eliminate any possibility of this program proceeding in the fashion outlined in the Order prior to 1999 -- three years after the Telecommunications Act authorized discounted rates for libraries, schools, and rural health care providers. The stringent deadlines set by the Congress for the implementation by the FCC of section 254(h) clearly show the Congressional intent to have this program implemented as expeditiously as possible. Granting a stay would contradict this intent by delaying implementation even further.

Furthermore, while Petitioners' argument argue that the failure to impose a stay would impose irretrievable losses on the Petitioners is false (see Section III, above), the imposition of a stay would impose irretrievable losses on those entities who designated by Congress to benefit from the program. Libraries and schools would be unable to benefit from the discounts

¹⁴Connecting the Nation: Classrooms, Libraries, and Health Care Organizations in the Information Age. National Telecommunications and information Administration, Office of Telecommunications and Information Applications, Department of Commerce, June 1995.

mandated in the Act for the duration of the stay. Given that libraries and schools would be unable to recover the difference in the cost of telecommunications services that they would have to pay for the duration of the stay, and that they would be unable to recover the costs that altering, delaying, and modifying the implementation of their technology goals, the imposition of a stay would inflict irreparable harm on libraries, schools, and rural health care providers.

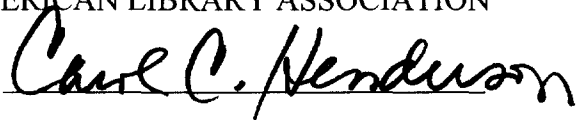
V. Conclusion

In order for the Commission to grant Petitioners a stay, Petitioners must prove that (1) they are likely to succeed on the merits of review; (2) they will suffer irreparable harm absent a stay; (3) a stay would not substantially harm other parties; and (4) a stay would serve the public interest. They have failed to prove any of these contentions; hence, a stay would be inappropriate at this time and should not be granted by the Commission.

Respectfully submitted,

AMERICAN LIBRARY ASSOCIATION

By:



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202/628-8410

July 18, 1996

Attachment 1: Letters to SBC

1. Letter from Richard J. Rademacher, Director, Wichita Public Library, to Edward Whitacre, Chairman/CEO SBC Communications.
2. Letter from Bonnie J. Buckley, Nevada State Library, to Edward Whitacre, Chairman/CEO SBC Communications.



BOB MILLER
Governor

JOAN G. KERSCHNER
Department Director

STATE OF NEVADA
DEPARTMENT OF MUSEUMS, LIBRARY AND ARTS
NEVADA STATE LIBRARY AND ARCHIVES

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State Library Services
Library Development
Archives and Records
Literacy Coalition
Regional Library for the Blind
and Physically Handicapped

To: 210/351-3553

July 16, 1997

Edward Whitacre, Chairman
SBC Communications Inc.
175 East Houston, Suite 1300
San Antonio, TX 78205

RE: UNIVERSAL SERVICES PROVISION OF TELECOMMUNICATIONS ACT

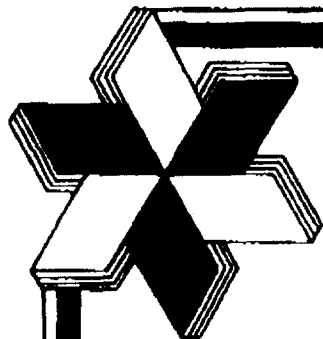
We were surprised and dismayed to hear of your opposition to discounted telecommunications rates for libraries and schools provided by the Telecommunications Act of 1996. Libraries and telecommunications companies have a common mission of making services universally available to all consumers. It has taken a long time to get to the point where quality services will soon be within reach of all of our collective customers. We both have a stake in providing access to the world of information through advanced telecommunications services, and we must cooperate if this goal is to become a reality. To this end, we are asking that you withdraw your legal challenge to the Universal Services Provision.

We understand that in the July 3 filing you anticipate "unrecoverable economic losses" as a result of supporting universal service for libraries and schools. The Order on Reconsideration adopted by the FCC on July 10, 1997 makes it clear that the Commission is conducting a thorough study in order to clarify, and where necessary, to modify the formula in order to allow carriers to receive sufficient support to recover expenses.

We believe the FCC will facilitate contributions of all telecommunications services to universal service in an equitable and nondiscriminatory way to provide equitable services to all consumers, including those in low income, rural, and remote areas. Please let us know how we can cooperate toward this common goal.

Cordially,

Bonnie J. Buckley
Bonnie J. Buckley
Library Planning and Development



WICHITA PUBLIC LIBRARY
The Discovery Center

RICHARD J. RADEMACHER
Librarian

July 15, 1997

Edward Whitacre, Chairman/CEO
SBC Communications, Inc
175 East Houston, Suite 1300
San Antonio, TX 78205

Dear Mr. Whitacre:

It was with disappointment that I learned earlier today of SBC Communications request for a stay to stop implementation of discounted telecommunications rates for libraries and schools.

Since February 1st of this year, our library has offered public Internet access from six libraries within our library system. The service has been a great success and has already come to be considered an essential component of the basic information delivery we provide to our customers.

Our initial installation of the Internet was made possible through the hard work of our Friends of the Library and through the efforts of telecommunications vendors including Southwestern Bell. To expand the service to what is needed to match the ongoing and increasing demand, our library will need the benefit of "e-rate" discounts.

Delaying or revoking the discount program will seriously affect our ability to provide both our customers and our employees with the Internet information resources they need. Please suspend your efforts to challenge the universal service support program for libraries and schools.

Sincerely,

Richard J Rademacher
Director of Libraries